STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2000
v JAMIE HARRINGTON SYLVESTER, Defendant-Appellant.	No. 214172 Saginaw Circuit Court LC No. 98 015394 FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KENNETH DWAYNE JONES, Defendant-Appellant.	No. 214187 Saginaw Circuit Court LC No. 98 015393 FC

Before: Gribbs, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

After a jury trial, defendant Sylvester (Docket No. 214172) and defendant Jones (Docket No. 214187) was each convicted of one count of second degree murder, MCL 750.317; MSA 28.549, and one count of conspiracy to assault with the intent to commit great bodily harm less than murder, MCL 750.84, 750.157a; MSA 28.279, 28.354(1). Each defendant received a sentence of life in prison for the second degree murder conviction, and a concurrent term of 80 to 120 months for the conspiracy to assault conviction. Defendants appeal as of right. In each of these consolidated appeals, we affirm.

I

Both defendants first contend that the trial court erred in denying their motions to sever the joint trials of Sylvester, Jones, Evee Demarko Cooper and Christopher Robert Mitchell because all four defendants possessed antagonistic trial defenses.

> [P]ursuant to MCL 768.5; MSA 28.1028, and MCR 6.121(D), the decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. [*People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).]

There is a strong policy favoring joint trials in the interests of justice, judicial economy and administration, and a defendant does not have an absolute right to a separate trial. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. *Id*. at 359-360.

At trial, all four defendants moved for severance on the basis that during a joint trial each defendant would attempt to minimize his own involvement in the crime while maximizing the other defendants' culpability. While a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, the standard for severance is not lessened in this situation. *Hana*, *supra* at 347. Mere inconsistency of defenses is not enough to mandate severance; rather, the defenses must be mutually exclusive or irreconcilable. "[D]efenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the codefendant." *Id*. at 349-350. Incidental spillover prejudice, which is almost inevitable in a multidefendant trial, does not suffice. *Id*. at 349.

The four defendants essentially conceded at trial that Cooper commenced the assault on the victim by striking him twice in the face before returning to his bunk, and that Sylvester, Jones and Mitchell subsequently continued the victim's beating by gathering around the victim's body and punching, kicking and stomping the victim. Moreover, defendant Jones did not contest that he had jumped from a top bunk bed onto the victim's body. Instead, Sylvester, Jones and Mitchell attempted to suggest that the other defendants inflicted the critical damage to the victim's head. These individual defense theories are merely inconsistent with respect to the extent of each defendant's participation in the group beating and the extent of damage each defendant inflicted on the victim's brain. None of the defenses are so mutually exclusive that they require the jury to conclude that only certain defendants attacked the victim while others did not. *Hana*, *supra* at 349-350.

Furthermore, the prosecutor pursued murder convictions pursuant to an aiding and abetting theory of liability. To establish guilt under an aiding and abetting theory, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant

performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). An aider or abettor "may . . . be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39; MSA 28.979. The Supreme Court in *Hana* stated as follows regarding the aiding and abetting theory in the context of a joint trial:

> The risk of prejudice is reduced even more in these cases by the significant fact that the prosecutor charged defendant . . . as an aider and abettor, MCL 767.39; MSA 28.979, and did not contend that he fired the fatal shot. Finger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses. The properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal. [*Hana*, *supra* at 360-361.]

To the extent that at trial the defendants' defenses focused on the allegedly varying degrees of each other's participation in the beating, any distinctions in this respect cannot be deemed material when each defendant remains potentially liable as an aider and abettor on the basis of his participation, irrespective of the degree of injury his own blows may have inflicted. We therefore conclude that the defendants at trial did not possess mutually exclusive defenses, and that the trial court did not abuse its discretion in denying defendants' severance motions.

II

Defendant Sylvester next argues that the trial court erred in refusing to instruct the jury pursuant to CJI2d 16.15, which would have permitted the jury to determine that Jones' leap from the bunk onto the victim represented an independent intervening cause of the victim's death that absolved Sylvester of any liability for his participation in the beating. The trial judge bears responsibility for instructing the jury regarding the law applicable to the case, and fully and fairly presenting the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The failure to give a requested instruction constitutes error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Defendant Sylvester incorrectly argues that CJI2d 16.15 applies to the facts of this case. This instruction's language that "[i]t is not enough that the defendant's act made it possible for the death to occur" contradicts the theory of aiding and abetting liability that the trial court presented to the jury. Pursuant to the theory of aiding and abetting liability, Sylvester's participation in the victim's beating renders him liable for murder of some degree, or one of several lesser included offenses irrespective of whether one of his blows or one of Jones' blows could arguably be considered the definitively fatal blow. This contradiction between CJI2d 16.15 and the aiding and abetting instructions explains the

CJI2d 16.15 use note's admonition, "Do not use this instruction for cases involving aiding and abetting, concert of action, or conspiracy." Because CJI2d 16.15 did not correctly apply within the context of the instant case's facts, charges and theories, and because the trial court's instructions otherwise fully and fairly presented the case to the jury in an understandable manner, the trial court properly refused defendant's requested instruction. *Moldenhauer*, *supra*; *Moore*, *supra*.

III

Defendant Sylvester also contends that the trial court improperly denied his motion for directed verdict regarding the first degree murder charge because no evidence showed that he either intended to kill the victim or premeditated and deliberated the crime. In reviewing a motion for a directed verdict of acquittal, a court must consider the evidence presented by the prosecutor up to the time the motion is made in the light most favorable to the prosecutor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Viewing the evidence presented at trial and the reasonable inferences arising therefrom in the light most favorable to the prosecutor, a reasonable jury could have concluded beyond any reasonable doubt that defendant Sylvester acted with intent to kill the victim and premeditated and deliberated his attack on the victim. With respect to Sylvester's intent to kill, this may reasonably be inferred from the brutality and length of the beating the victim suffered. *People v Hoffmeister*, 394 Mich 155, 160; 229 NW2d 305 (1975). Some testimony estimated that Jones, Sylvester and Mitchell continuously and repeatedly over a two-minute period kicked and stomped on the victim's head.

Premeditation and deliberation may be established through evidence indicating a possible motive to kill the victim, together with evidence of a defendant's actions before the killing and the circumstances of the killing itself. *People v Schollaert*, 194 Mich App 158; 486 NW2d 312 (1992); *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982). Regarding possible motives to kill the victim in this case, some testimony showed that the victim behaved in a confrontational manner on the morning of the assault, and shortly before the beating commenced many of the cellmates, including Sylvester, Jones, Mitchell and Cooper, read from some papers brought into the cell that the victim had been charged with gross indecency involving another man. Following this discovery, Sylvester suggested to the inmates gathered around the cell table that the first one to roll seven starts it (the fight) off. Dice then proceeded several times around the table of six to eight inmates before Cooper rolled seven. Cooper then left the table, approached the victim, spoke with him briefly, then twice punched the victim's face. Immediately thereafter, Sylvester, Jones and Mitchell together descended on the victim, punching him down to one knee and then down to the ground. Sylvester, Jones and Mitchell then repeatedly stomped, kicked the victim at or near his head, with Jones even leaping from a bunk onto the victim's head. From the totality of these circumstances, a jury could have reasonably concluded that Sylvester, Jones, Mitchell and Cooper premeditated and deliberated the victim's murder, and that the time they spent rolling dice before the attack and the two minute length of the beating afforded ample opportunity for defendant Sylvester to reconsider the murder. *People v Anderson*, 209 Mich App 527, 537-538;

531 NW2d 780 (1995); *Schollaert*, *supra* at 170. Therefore, the trial court properly denied the motion for directed verdict.

IV

Defendant Sylvester lastly claims that his life sentence represents a disproportionate sentence and cruel and unusual punishment. Sylvester's sentencing information report places him within second degree murder offense level IV-C of the sentencing guidelines, which recommend fifteen to thirty years or life. Because Sylvester's sentence falls within the guidelines' range, it is presumed proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). In light of the brutal nature of the beating, the lack of significant provocation, and the fact that defendant accumulated several convictions by his twentieth birthday, and absent any suggestion by defendant that some unusual circumstances warranted a lesser sentence, we find the life sentence proportionate to the circumstances surrounding defendant and his crime. *People v Milbourn*, 435 Mich 630, 635-636, 661; 461 NW2d 1 (1990). Furthermore, because defendant's sentence is proportionate, it represents neither cruel or unusual punishment under the Michigan Constitution nor cruel and unusual punishment under the United States Constitution. *People v Bullock*, 440 Mich 15, 27-31; 485 NW2d 866 (1992); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

V

Defendant Jones contends that his lack of representation by counsel during a critical stage of the trial proceedings, specifically the prosecutor's motion one day prior to trial to amend his witness list, deprived Jones of due process and a fair trial. Because defendant never raised an objection to this lack of representation before the trial court, we "should reverse only [if] the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines*, *supra* at 774. The prosecutor's addition to his witness list of Helen Randolph, the substance of whose testimony was that she spoke with defendant at or near the time of his death and heard noise in the background, did not constitute "prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel." *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969). Even assuming that the motion hearing qualified as a critical stage of the proceedings, defendant Jones has failed to explain how his lack of counsel prejudiced him when other defense counsel present objected to Randolph's addition to the list. Therefore, we find no error requiring reversal. *Carines, supra*.

VI

Defendant Jones next argues that the prosecutor engaged in misconduct by calling four inmate witnesses while knowing that these witnesses would refuse to testify concerning the victim's beating, thus effectively invoking their Fifth Amendment rights. The prosecutor's calling of a witness who invokes his Fifth Amendment right against self-incrimination may result in some level of error, constitutional or evidentiary. *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998). In this case, however, none of the witnesses about whose testimony defendant complains in fact invoked his Fifth Amendment rights. Consequently, all four trial defense counsel had the opportunity to cross examine

the witnesses who incredibly disclaimed knowledge of the victim's beating to ascertain the bases for the witnesses' lacks of knowledge and to negate any alleged inference that these witnesses were somehow associated with the four trial defendants. Because defendant Jones offers no authority to support his suggestion that a witness' evasive testimony effectively parallels a witness' invocation of his Fifth Amendment rights, we need not further review this issue. *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987) (finding claims of error abandoned on appeal because no support was cited for the argument).

VII

Defendant Jones additionally asserts that the trial court improperly admitted several unfairly prejudicial autopsy photographs of the victim's skull and brain. The trial court did not abuse its discretion in admitting the photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). The photographs, taken one day after the victim's death and which illustrated the location, nature and extent of the victim's injuries, were relevant proof with respect to whether the four trial defendants possessed the specific intent to kill the victim and whether the four trial defendants premeditated and deliberated the murder. MRE 401; *Mills*, *supra* at 71; *Anderson*, *supra* at 536. Furthermore, the forensic pathologist testified that the photographs would assist him in conveying the nature and extent of the victim's injuries, and the photographs thus were relevant to this witness' credibility. *Mills*, *supra* at 72-73. Given the photographs' relevance to these several purposes, we conclude that any potential unfair prejudice arising fom the photographs' gruesome nature did not substantially outweigh their significant probative value. MRE 403; *Mills*, *supra* at 74-80.

VIII

Lastly, Defendant Jones claims that the trial court incorrectly assigned to second degree murder offense variable (OV) four twenty-five points on the basis of an aggravated physical assault when Jones already "was charged and convicted of Assault with Intent to Commit Great Bodily Harm, which conviction naturally encompasses an aggravated physical assault. Thus, defendant was convicted of such an offense and then subsequently scored again for such an offense on the sentencing information report." Because defendant raises no challenge to the factual predicate on which his sentence rests, but instead argues that the trial court misinterpreted and therefore misapplied OV four, defendant has failed to state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 175-177; 560 NW2d 600 (1997) ("[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate."). Furthermore, in light of the brutal nature of the crime, defendant Jones' actions, which included at least once jumping off the bunk bed onto the victim's head, and Jones' criminal background, we find his life sentence proportionate. *Milbourn*, *supra* at 635-636.

Affirmed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage